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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 79

STELLA CONNELL,

Appellant,

—v.—

JAMES M. HIGGINBOTHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

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No. .....

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—v.—

JAMES M. HIGGINBOTHAM, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

Appellant appeals, on behalf of herself and the class she represents, from so much of the Judgment and Order of a three-judge District Court for the Middle District of Florida, dated October 30, 1969, as upholds the constitutionality of portions of the Florida loyalty statute and of an oath, required pursuant to it as a condition of employment by the State of Florida, and as denies appellant's prayer that appellees be permanently enjoined from enforcing said statute and requiring said oath.

Opinions and Order Below

The opinions and order of the three-judge District Court are not reported. Copies of the opinions and order are contained in the Appendix, *infra*, pp. 1a-21a.

Jurisdiction

This class suit was brought under 28 U.S.C. §§1331, 1343, 2201, 2202, 2281 and 2284, Rule 23 of the Federal Rules of Civil Procedure, and the First, Fifth and Fourteenth Amendments to the Constitution of the United States to declare unconstitutional and enjoin enforcement of the provisions of Florida Statutes §§876.05-876.10 and of the loyalty oaths required pursuant to them as a condition of public employment. The order of the three-judge District Court denying some of the appellant's prayers for relief was dated October 30, 1969, and notice of appeal was filed in the District Court for the Middle District of Florida on November 25, 1969. The jurisdiction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C. §1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *Palmetto Fire Ins. Co.* v. *Conn,* 272 U.S. 295, 305; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 85; *Shelton* v. *Tucker,* 364 U.S. 479; *Baggett* v. *Bullitt,* 377 U.S. 360; *Flast* v. *Cohen,* 392 U.S. 83.

Statutes and Oaths Involved

Involved here are §§876.05-876.10 of Fla. Stats. Ann. and the various loyalty oaths upon which appellant's employment as a school teacher was conditioned. The statutory provisions and oaths to which she was subjected are set forth in the Appendix, *infra,* pp. 22a-26a.

Questions Presented

1. Do the portions of the Florida loyalty statute and oath that were validated by the District Court violate, on their faces and as applied, the freedoms of expression, belief, and privacy guaranteed by the First and Fourteenth Amendments?

2. Do the portions of the Florida loyalty statute and oath that were validated by the District Court deny, on their faces and as applied, due process of law under the Fourteenth Amendment because they are unduly vague and provide no opportunity for clarification?

3. Are the provisions of the Florida loyalty statute and oath nonseverable and therefore unconstitutional in their entirety?

Statement of the Case

The appellant is a citizen of the United States and resides in Orange County, Florida. The appellees are the Superintendent of Public Instruction of Orange County, Florida and the Chairman and members of the Board of Public Instruction of Orange County, Florida. After the Complaint was filed, the Commissioner of Education of the State of Florida was granted leave to intervene as a party defendant and presently is an appellee before this Court.

On or about January 16, 1969, appellant made application for a teaching position with the Orange County school system (App., *infra,* p. 2a). She was interviewed by the principal of Callahan Elementary School, Orlando, Orange County (App., *infra,* p. 3a). On or about January 27, 1969 she was employed as a classroom teacher in the Fourth

Grade of that school by the appellees and their agents (App., *infra*, p. 3a). The District Court found that her employment was as a substitute teacher subject to final approval (App., *infra*, p. 3a). The appellant contends that this was a temporary status, required of all new teaching personnel, and she was assured by the appellee's agents that shortly she would become a permanent teacher for the balance of the 1968-69 school year.

At no time prior to her employment was the appellant informed by the appellees that execution of a loyalty oath was a condition of her employment and payment by the appellees (App., *infra*, p. 3a). The District Court did find, however, that she had some knowledge of the applicable statute at the time she commenced the employment (App., *infra*, p. 3a). On February 7, 1969, the appellees notified appellant that she would be required to execute a loyalty oath as a condition of continuing her employment (App., *infra*, p. 3a). Specifically she was asked to declare:

> "I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of .... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or in-

directly, the overthrow of the Government of the United States or of Florida by force or violence." App., *infra*, pp. 3a, 8a, 25a.

The District Court found that the oath was identical to the one declared unconstitutional by this Court nine years ago in a case involving the precise statute at issue in the instant case and many of the same parties-defendant in their official capacities. *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278 (App., *infra*, pp. 8a-9a). (A facsimile of the oath is set forth in the Appendix, *infra* at p. 25a). The appellant declined to execute the oath on the ground that it was invalid and unconstitutional and had been declared so by this Court (App., *infra*, p. 3a). The appellees then asked appellant to sign a version of the oath as judicially amended by the Supreme Court of Florida on remand from this Court (App., *infra*, p. 3a). *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962).[1] The appellant refused to sign the modified oath, and the District Court found that processing of her employment papers was halted before final consideration by the Board of Public Instruction (App., *infra*, p. 3a).

The appellees informed the appellant that they were barred by Section 876.08 of Fla. Stats. Ann. from paying

[1] On remand, the Supreme Court of Florida ruled that only the phrase "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was constitutionally infirm under this Court's decision. The phrase was declared severable both from the statute and from the oath. Thus the second oath required of appellant was identical to the first one, but for the absence of the void phrase. Notably, the first oath was on a mimeographed "official" form; the second was typed from that master, eliminating the guilty phrase. A facsimile of the second oath is found in the Appendix, *infra*, p. 26a.

her for past or future services until the oath was executed (App., *infra*, p. 3a). After they were informed by the appellant that she anticipated filing suit in the United States District Court, the appellees permitted the appellant to remain in her teaching post without pay, pending judicial decision on the matter (App., *infra*, p. 3a).

On February 26, 1969, the appellant filed her complaint against the appellees. After the District Court denied her motion for a temporary restraining order she was dismissed by the defendants from her teaching position on March 18, 1969 (App., *infra*, pp. 3a-4a).

On October 30, 1969 the District Court entered its Judgment, in favor of the appellant individually and on behalf of all persons similarly situated. It ruled, *inter alia*, that: (1) Under Rule 23 of the Federal Rules of Civil Procedure, appellant had standing to maintain a class action "on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state" (App., *infra*, p. 6a). (2) The phrase in the statute and first loyalty oath, "I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party," had been declared unconstitutional by this Court in 1961 (App., *infra*, p. 9a). (3) The phrases in the statute and the loyalty oaths, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence," unduly infringed "upon the right of free association granted by the First and Fourteenth Amendments . . . " (App., *infra*, p. 12a). (4) The phrases in the statute and the loyalty

oaths, "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence" and "I will support the Constitution of the United States and of the State of Florida," are not themselves unconstitutional (App., *infra*, pp. 12a-14a). (5) Under Florida and federal law, the unconstitutional portions of the statute and oath are severable; consequently, the State of Florida still may require a loyalty oath as a condition of public employment (App., *infra*, pp. 8a, 14a). (6) Since the appellant was discharged solely because she declined to execute an oath containing unconstitutional language, she was entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching and for the salary she would have received from March 18, 1969, to the end of the school term in June 1969 (App., *infra*, p. 16a).

The defective portions of the statute and oath were declared unconstitutional (App., *infra*, p. 15a). The appellees were permanently enjoined from conditioning employment on the taking of an oath including the language declared unconstitutional and "from enforcing §876.07 of [Fla. Stats. Ann.] in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered" (App., *infra*, p. 20a). Finally, jurisdiction was retained over the suit "for the purpose of insuring compliance with the injunction and the order directed to the defendants to pay the plaintiff the salary that has been adjudged to be due and owing" (App., *infra*, p. 20a). Circuit Judge Simpson, who concurred in part and dissented in part, would have declared the two remaining phrases in the statute and

oaths unconstitutional under the First and Fourteenth Amendments (App., *infra,* pp. 17a-18a).

On November 25, 1969, Notice of Appeal was filed by the Appellant, appealing from the portions of the District Court's decision and Order sustaining the constitutionality of the two remaining phrases in the statute and loyalty oath, declining to enjoin the appellees from enforcing these and any other applicable portions of the statute, and declining to declare §§876.05-876.10 unconstitutional in their entirety. The appellees have not filed a cross appeal.

Subsequent to the decision and Order of the District Court, employees of the University of Florida were required to execute loyalty oaths in the form presumptively sustained by the District Court in the instant case. Three employees, two teachers and one library clerk, who declined to execute the revised oath were discharged in mid-year pursuant to §876.06 of Fla. Stats. Ann. They have filed a new class action in the Court below. *Adams* v. *Board of Regents of the State of Florida,* Civ. Action No. 69-240, M.D. Fla. A stipulation which was executed in that case on December 17, 1969 is set out in the Appendix, *infra,* pp. 27a-29a. Local counsel in the instant case is also lead counsel in the new case.

The Questions Are Substantial

The statutory and oath requirements left standing by the District Court raise fundamental questions under the First and Fourteenth Amendments. We believe that these questions are resolved by well established principles enunciated by this Court, according to which the provisions at issue unconstitutionally limit speech and belief of public employees, notably teachers, in the State of Florida. Nevertheless this appeal is an appropriate one for plenary review by the Court. First, this is the first modern occasion for the Court to consider language in an oath and statute cast explicitly in terms of the oath taker's political *beliefs* rather than his advocacy or organizational membership. Second, this case presents the Court's first opportunity to pass on the constitutionality of a so-called affirmative loyalty oath in tandem with numerous so-called negative loyalty oaths, rather than in isolation and therefore presumptively an oath of office or a mere symbolic declaration of fidelity. *Compare, Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969); *Pedlosky* v. *Massachusetts Institute of Technology,* 352 Mass. 127, 224 N.E.2d 414 (1967), *with, Bond* v. *Floyd,* 385 U.S. 116, 135-36; *Knight* v. *Board of Regents of University of State of New York,* 269 F. Supp. 339 (S.D. N.Y. 1967), *aff'd mem.,* 390 U.S. 36; *Hosack* v. *Smiley,* 276 F. Supp. 876 (D. Colo. 1967), *aff'd mem.,* 390 U.S. 744. Third, plenary review is necessary to finally put to rest controversy over the Florida law and practice which were first reviewed and voided (at least in part) almost ten years ago in *Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278.

I.

On their face and as applied, the portions of the statute and oath declared not unconstitutional by the Court below, violate the First and Fourteenth Amendments' protection of the freedom of expression, belief, and privacy.

The District Court expressly ordered and adjudged that: "The following language of Section 876.05 of [Fla. Stats. Ann.] is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> 'I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; and that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence.'" App., *infra,* pp. 14a-15a.

As a direct result of this ruling, the appellant and members of the class she represents are subject to precisely this oath as a condition precedent to public employment. See Stipulation, App., *infra,* pp. 27a-29a.

A. By its very terms, the phrase "I do not believe in the overthrow of the government of the United States or

of the State of Florida by force or violence" constitutes a negative loyalty oath. Beginning with the 1961 decision in *Cramp*, the predecessor of this case, each such test oath to come before this Court has been found to be in violation of the First Amendment. See *Cramp* v. *Board of Public Instruction of Orange County*, 368 U.S. 278; *Baggett* v. *Bullitt*, 377 U.S. 360; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Whitehill* v. *Elkins*, 389 U.S. 54; *James* v. *Gilmore*, 389 U.S. 572, *affirming per curiam*, 274 F. Supp. 75 (N.D. Tex. 1967). Further, the decision of the Court below is the only one, since this Court's ruling in the *Whitehill* case, by which a state or inferior federal court upheld a negative loyalty oath (or authorizing statute) for public employees. *Compare, e.g., Vogel* v. *County of Los Angeles*, 64 Cal. Rptr. 409, 434 P.2d 961 (1967); *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968); *Haskett* v. *Washington*, 294 F. Supp. 912 (D.D.C. 1968); *Stewart* v. *Washington*, 301 F. Supp. 610 (D.D.C. 1969); *Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969); *Thalberg* v. *Board of Trustees of the University of Illinois*, —— F. Supp. —— (No. 68 C 211 & 212 N.D. Ill. June 13, 1969). Arguably, all such negative oaths, regardless of formulation, offend the First and Fourteenth Amendments' freedoms of expression, belief, and privacy.

The District Court's arguments, and the decision they support, are grossly inconsistent with the governing pronouncements of this Court on the meaning and scope of the First Amendment's freedom of expression and belief. The District Court proceeded from the notion that the State is free to limit employment opportunities on the basis of the putative *beliefs* and only the putative *beliefs* of one who

declines to execute a loyalty oath. Such an approach offends the most fundamental assumptions of a free society. It also flies in the face of all the loyalty oath, internal security, and freedom of speech decisions rendered by this Court at least since 1961. As Judge Simpson noted in dissent below:

> "This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General. In those cases belief has at least been acted upon to the extent of joining an organization." App., *infra*, p. 18a.

Judge Simpson's analysis is confirmed by this Court's most recent decisions on freedom of speech, which make it abundantly clear that even spirited advocacy of unlawful activity is immune from state sanction unless it constitutes "incitement to imminent lawless action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 1830. See also, *e.g.*, *Street* v. *New York*, 394 U.S. 576; *Watts* v. *United States*, 394 U.S. 705; *United States* v. *Robel*, 389 U.S. 258.

Obviously, mere belief, as yet unwedded to any action not even speech, deserves even greater protection than

advocacy. Numerous pronouncements by the Court and its members make it clear that the "First Amendment gives freedom of mind the same security as freedom of conscience." *Thomas* v. *Collins*, 323 U.S. 516, 531. "[T]he domains of conscience and belief," Justice Douglas has said "have been set aside and protected from government intrusion . . . . *What a man thinks is of no concern to government.*" *Speiser* v. *Randall*, 357 U.S. 513, 536 (concurring opinion) (emphasis added). See also, *Sweezy* v. *New Hampshire*, 354 U.S. 234, 266 (Frankfurter, J., concurring). In *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 412, the Court recognized the constitutional requirement that "one be permitted to believe what he will," and Mr. Justice Black, in dissenting, noted that "[i]ndividual freedom and governmental thought-probing cannot live together." *Id.* at 446. See also, *Watkins* v. *United States*, 354 U.S. 178, 198; *United States* v. *Rumely*, 345 U.S. 41.

The notion that the First Amendment reserved certain areas free from governmental inquiry was well-established long before the now famous exposition of the right of privacy in *Griswold* v. *Connecticut*, 381 U.S. 479. Articulated most forcefully by Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478, the constitutional right at issue was simply "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." The framers of the Constitution, he said, had "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." *Ibid.* See also *Stanley* v. *Georgia*, 394 U.S. 557.

The most comprehensive decision to plumb the First Amendment dimension of this right to privacy is the cele-

brated *Flag Salute* case, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624. "To sustain the compulsory flag salute," the Court said, in terms singularly appropriate here,

> ". . . we are required to say that a Bill of Rights which guards the individual's right to speak his mind, left it open to public authorities to compel him to utter what is not [or for that matter what is] on his mind." *Id.* at 634.

The District Court sought to justify just such compulsion on the ground that "what a person believes has a central effect on the views and actions taken by that person" and the State has a peculiarly high interest, particularly at the primary school level, in neutralizing "the potential for the exertion of the principles of violent overthrow as a way of life [by school teacher-believers] on the younger, inferior mind . . . [of public school students]" (App., *infra*, p. 13a). The District Court's argument represents a distorted view of the applicable constitutional principles, in addition to those prohibiting the state from punishing beliefs.

Precisely because of the sensitivity and vulnerability of the classroom this Court repeatedly has reaffirmed the principle that "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 603. See also, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183; *Sweezy* v. *New Hampshire*, 354

U.S. 234, 250; *Barenblatt* v. *United States*, 360 U.S. 109, 112; *Baggett* v. *Bullitt*, 377 U.S. 360, 369; *Whitehill* v. *Elkins*, 389 U.S. 54, 59-60; *Tinker* v. *Des Moines Community School District*, 393 U.S. 503.

The Florida loyalty statute and oath also suffer fatal defects under the overbreadth doctrine, which has two components. A law is overbroad when it proscribes acts "which legitimately may be proscribed" as well as acts "which may not be proscribed." *Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 609; *see also, e.g., United States* v. *Robel*, 389 U.S. 258, 267-68; *Schneider* v. *Smith*, 390 U.S. 17, 24; *Elfbrandt* v. *Russell*, 384 U.S. 11. A law is also overbroad, in violation of the First Amendment, if some means less restrictive of the essential democratic interest in free communication is available for government to pursue its other subordinating or paramount interests. See, *e.g., United States* v. *Robel, supra; Zwickler* v. *Koota*, 389 U.S. 241, 251; *Shelton* v. *Tucker*, 364 U.S. 479, 488; *Schneider* v. *Smith, supra; United States* v. *O'Brien*, 391 U.S. 367, 376-77. The Florida loyalty statute and oaths suffer from both defects of overbreadth.

They are unconstitutional under the first aspect of the doctrine to the extent that they penalize mere beliefs rather than affirmative unlawful actions or at the very least advocacy which constitutes incitement to imminent unlawfulness. In addition, they reach much too far in proscribing belief in "the overthrow of the Government of the United States or the State of Florida by force or violence" without regard to context.

The Florida statute and oaths are unconstitutional under the second aspect of the overbreadth doctrine as well. The state cannot sustain its burden of demonstrating that no

less restrictive means are available to accomplish its subordinating purpose. The only paramount interests discovered by the District Court to justify imposition of this restriction were "the state's legitimate interest in educating youth and in the teaching of the principle of ordered government and the orderly process for change" (App., *infra*, p. 14a). It is difficult to understand how these restrictions facilitate "educating youth" unless the District Court meant providing exposure (or is it indoctrination?) only to orthodox ideas. Obviously, such an interest cannot survive First Amendment scrutiny. Further, the state certainly can assure "the teaching of the principle of ordered government and the orderly process for change" without infringing upon contrary beliefs by some teachers or even limiting instruction to that principle as though it were immutable. Finally, if the state has a legitimate interest in keeping teachers from indoctrinating grade school, secondary school, or college students with a contrary principle, the state can fulfill that interest without invading the First Amendment province of individual beliefs and advocacy. The state might see to it that instruction is received in the principle of orderly government and processes; conceivably it might sanction purposeful and one-sided indoctrination of students in contrary principles.

B. The second of the provisions upheld by the District Court requires applicants for public employment to "solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida." This provision is very similar to the oath of office prescribed in the United States Constitution, Art. II, §1 (see *Bond* v. *Floyd*, 385 U.S. 116, 135-36), and to the affirmative oaths left standing by this Court in the recent New York

and Colorado cases. *Knight* v. *Board of Regents*, 390 U.S. 36; *Hosack* v. *Smiley*, 390 U.S. 744. Nevertheless, this Court should subject the Florida provision to plenary review and declare it to be in violation of the First Amendment.

Florida's affirmative loyalty oath, unlike others the Court may have considered, is not a mere symbolic and public declaration of fidelity to the Constitution. The statute which prescribes this oath reveals full well that it is an integral part of a comprehensive, repressive program designed to invade the privacy of the oathtaker's mind, and unconstitutionally restrict his beliefs, utterances, and associational activities. This so-called oath of office is bracketed into a statute which on its face contained four additional "negative" test oath requirements, each of which unconstitutionally invaded First Amendment rights. The provisions of that statute (Fla. Stats. Ann. §§876.05-876.10) are themselves found in the middle of Chapter 876 of the Florida Statutes Annotated, which consists of 31 somewhat interrelated sections, each dealing with some aspect of "Criminal Anarchy, Communism, Wearing of Masks, Hoods, Etc." As the Supreme Court of Florida dispositively ruled:

> "The obvious legislative purpose in enacting the subject statute was to prevent the election or employment of public officials and employees who are knowingly disloyal to the government of the United States or to the State of Florida and who subscribe to the doctrine of accomplishing change in government by the employment of force and violence." *Cramp* v. *Board of Public Instruction of Orange County*, 137 So.2d 828, 830 (1962).

Further the District Court upheld this remaining oath for precisely the same reasons it upheld the "belief" provision.

The single remaining oath should be evaluated in that statutory context, not in isolation. *Compare, e.g., Keyishian* v. *Board of Regents,* 385 U.S. 589; *Whitehill* v. *Elkins,* 389 U.S. 54. When viewed in this context, the statutory and oath provision must be voided for all the reasons elaborated in the opinions of this Court and the District Court striking down three of the "negative" clauses and the reasons already suggested in this Jurisdictional Statement for striking down the fourth and remaining "negative clause." *Compare Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969), in which an entire statute prescribing two oaths, one negative and the other affirmative, was voided although the court addressed only the unconstitutionality of the negative oath.

II.

On their face and as applied, the two statutory and oath provisions left standing by the District Court violate the due process clause of the Fourteenth Amendment in that they are unduly vague and provide no opportunity for clarification hearing or procedure.

A "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Co.,* 269 U.S. 385, 391; *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453; *Winters* v. *New York,* 333 U.S. 507, 515. Indefinite oath statutes

have a special vice. Not only are they impermissibly vague, but in their vagueness they "abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker . . . to 'steer far wider of the unlawful zone,' *Speiser* v. *Randall,* 357 U.S. 513, 526 . . . , than if the boundaries of the forbidden area were clearly marked." *Baggett* v. *Bullitt,* 377 U.S. 360, 372. This further aggravation of the vice of vagueness demands the strictest standard of application, lest the free dissemination of ideas be the loser. *E.g., Cramp* v. *Board of Public Instruction of Orange County,* 368 U.S. 278, 287; *Smith* v. *California,* 361 U.S. 147, 151; *Whitehill* v. *Elkins,* 389 U.S. 54.

It is impossible to know what is meant by the declaration "I do not believe in the overthrow of the Government . . . by force or violence." Initially, the oath-taker does not know what the statute and oath contemplate by "believe in." Does it include speculative or tentative belief? Commitment to the policy of violent overthrow? Approval of violent overthrow under any or all circumstances? As already noted, it is not at all clear that government may proscribe or scrutinize these or any other such beliefs *qua* beliefs. Even if beliefs can be restricted with sufficient certainty, an oath-taker does not know what is contemplated by the phrase "overthrow of the Government." Does this mean an individual may not believe in the violent overthrow of a tyrannical government that has come to power by unlawful and violent means and has suspended or discarded the Constitution? If not, what does it mean? Cf. *Richardson* v. *Cole,* 300 F. Supp. 1321 (D. Mass. 1969), voiding for vagueness a loyalty statute containing the phrase "I will oppose the overthrow of the government. . . ."

Particularly when viewed in the context of the total statute, as Judge Simpson recognized dissenting below, the requirement that a public employee must swear to "support the Constitution of the United States and the State of Florida" is also so vague that few persons of common intelligence will agree upon the obligations which the oath imposes. The range of activities which might reasonably be deemed to be inconsistent with the affirmative oath in its negative statutory context is so broad in scope that a conscientious affiant could reasonably fear that he is asked to refrain from unascertainable areas of constitutionally protected speech and assembly. It is possible, for example, that the phrase "support the Constitution" may mean the avoidance of any categorically direct violation. Perhaps, more plausibly, the phrase requires avoidance of open and active criticism of the form of government established by the Constitution or of any advocacy to overthrow the government. If such is the meaning of the phrase, the statute purports to proscribe activities which include constitutionally protected activity. This Court has clearly ruled that not all advocacy, but only advocacy constituting incitement to imminent lawlessness, may be proscribed or limited by government. See, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444; *Yates* v. *United States*, 354 U.S. 298; *Noto* v. *United States*, 367 U.S. 290. At the very least, the term, if it has any meaning at all in this context, proscribes "alteration of . . . the constitutional form of government of the United States" and the State of Florida, a compulsory undertaking which this Court recently held to violate the Constitution. *Whitehill* v. *Elkins*, 389 U.S. 54, 57.

The vices which prompted this Court to strike down oaths and statutes in *Speiser, Cramp, Baggett, Elfbrandt, Key-*

ishian, and *Whitehill, supra,* are all present in the Florida statute and affirmative oath. The conscientious teacher who takes the oath cannot but be deterred from exercising First Amendment rights guaranteed him by the very Constitution he has sworn to support. The oath, in this statutory context, must fall because teachers "of character and integrity may well forgo their calling rather than risk prosecution for perjury or compromise thier commitment to intellectual and political freedom." *Elfbrandt* v. *Russell,* 384 U.S. 11, 18. The oath and statute must fall because: "We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom." *Whitehill* v. *Elkins,* 389 U.S. 54, 59-60.

The danger of vagueness in the Florida oath requirements is magnified by the fact that the statute provides for no mechanism by which the oathtaker may receive clarification of the oath. Under Fla. Stats. Ann. §§876.05-876.10, the prospective employee for whom negotiations are complete, save for the oaths (as was the case of the appellant), is given no opportunity to prove his loyalty or explain his reasons for refusing to sign the oaths. If he fails to sign at such a later stage, not only does he forfeit a position for which he is otherwise qualified or pay for work performed, but even more seriously, he suffers the stigma of having balked at the oath, however scrupulous may have been his reasons.[2] The absence of such a proce-

[2] There are many reasons, including conscientious objection (see, *e.g., Torcuso* v. *Watkins,* 367 U.S. 488; *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624), why one might balk at taking such oaths. See also, *e.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 511-12; *Baggett* v. *Bullitt,* 377 U.S. 360, 367-70; *Keyishian* v. *Board of Regents,* 385 U.S. 589, 600-01.

dure is equally harsh on the prospective employee who discovers the oath early in his quest for a government position; after such a discovery, he is unlikely to reach the stage at which he could even challenge the constitutionality of the oath requirement, as the appellant has done here. As Judge Wright suggested in a case very similar to the one under review, "I believe that such a result is inconsistent with the rigorous due process standards which govern the regulation of speech and association." *Haskett* v. *Washington,* 294 F. Supp. 912, 916 (D.D.C. 1968) (concurring opinion).[3]

Such indications as we have in Supreme Court decisions are to the effect that due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. *Cf. Speiser* v. *Randall,* 357 U.S. 513; *Lamont* v. *Postmaster General,* 381 U.S. 301. Recent decisions of the Court point the way to

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[3] This due process defect is part and parcel of the vagueness doctrine. Mr. Justice Brennan's concurring opinion in *United States* v. *Robel,* 389 U.S. 258, provides one of the most recent full dress analysis of the vagueness doctrine, when isolated from the overbreadth doctrine. His analysis matches the Court's positions in *Interstate Circuit* v. *City of Dallas,* 390 U.S. 676, 684-85 and *Shuttlesworth* v. *City of Birmingham,* 394 U.S. 147. It demonstrates that when an allegation of vagueness is made in a complaint, it is taken to include lack of procedural safeguards. As Justice Brennan suggested, a vague statute has one or a combination of three deficiencies. "First . . . . [a] failure to provide adequate standards [which] reflects Congress' failure to have made a 'legislative judgment.'" 389 U.S. at 275. "Second. . . . [A failure to] take steps to assure, 'respect for constitutional liberties' by preventing the existence of 'a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated." *Id.* at 277-78. "Third. The indefiniteness of the delegation . . . also results in inadequate notice to affected persons." *Id.* at 281.

a guarantee for the prospective employee who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education,* 350 U.S. 551, is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, and *Konigsberg* v. *State Bar of California,* 353 U.S. 252, extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.[4]

On the basis of these precedents, a three-judge federal district court found Idaho's loyalty oath unconstitutional because it afforded no procedure by which the non-signer might explain his actions and vindicate his loyalty. *Heckler* v. *Shepard,* 243 F. Supp. 841, 845 (D. Idaho 1965).

The provisions in the instant case are constitutionally vulnerable on just this ground. As developed also in *Slochower,* to draw an inference of disloyalty and disqualification from an unexplained refusal to sign—and without even affording an opportunity to explain—deprives the applicant of due process of law in the most basic sense. Thus, the instant loyalty oath scheme is procedurally as well as substantively deficient. See also, *Speiser* v. *Randall,* 357 U.S. 513; *Haskett* v. *Washington,* 294 F. Supp. 912, 918 (D.D.C. 1968) (concurring opinion).

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[4] In recent cases concerning control of obscenity, the Court has also stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See *Freedman* v. *Maryland,* 380 U.S. 51; *A Quantity of Books* v. *Kansas,* 378 U.S. 205; *Bantam Books* v. *Sullivan,* 372 U.S. 58; *Marcus* v. *Search Warrant,* 367 U.S. 717.

III.

The District Court erred in ruling that some portions of the Florida statute and oath were severable from the unconstitutional portions.

The Florida statute, §§876.05-876.10, is an interwoven and comprehensive whole. The entire statute and the entire oath are void, even if portions might have been valid if they had been enacted alone.

When, in the course of reviewing decisions of state courts, the Court declares a state provision unconstitutional, it customarily remands to the state court for determinations of severability. See *Bell* v. *Maryland*, 378 U.S. 226, 240-241; *Skinner* v. *Oklahoma*, 316 U.S. 535, 543; *Dorchy* v. *Kansas*, 264 U.S. 286, 289-91. However, even when reviewing state court decisions this Court has consistently declared that "in the absence of a controlling state decision, [it] may, in passing upon the claim under the Federal law, decide also the question of severability. But it is not obliged to do so." *Dorchy* v. *Kansas*, 264 U.S. 286, 291, quoted with approval in *Bell* v. *Maryland*, 378 U.S. 226, 240. On the other hand, "In cases coming from the lower Federal courts, such questions of severability, if there is no controlling state decision, must be determined by this court," *Dorchy* v. *Kansas*, 264 U.S. 286, 291; *Williams* v. *Standard Oil of Louisiana*, 278 U.S. 235, by applying the severability rules of the state. See, *e.g.*, *Reitz* v. *Mealey*, 314 U.S. 33, 38-39; *In re Wisconsin Builders Supply Co.*, 239 F.2d 649, 656-657 (7th Cir. 1956); *Commerce Oil Refining Corp.* v. *Minor*, 170 F. Supp. 396, 405 (D. R.I. 1959).

It is, therefore, appropriate for this Court to resolve the severability question posed in this case. The issue being a purely legal one of legislative purpose, nothing would be gained by remanding the case to the federal district court for disposition.

After this Court's 1961 decision in *Cramp*, the case was remanded to the Supreme Court of Florida. The Florida Court ruled that this Court had declared only one phrase in the oath and statute unconstitutional: " . . . that I have not [lent] and will not lend my aid, support, advice, counsel or influence to the Communist Party; . . . ". Applying Florida rules of severability, it then held that the void provision was severable from the statute and oath, and all else remained in force. 137 So.2d 828 (1962).

However, since it is now clear that not just one but between three and five of the five operative provisions of the oath and the statute are unconstitutional, the severability issue must be considered anew. Obviously if, as appellant has contended, all of the operative provisions are unconstitutional, the entire statute (§§876.05-876.10 Fla. Stats. Ann.) should be voided. The five sections of the statute are concerned solely with the loyalty oaths and their enforcement; they have no other reason to exist *Compare Whitehill* v. *Elkins*, 287 F. Supp. 61 (D.Md. 1968) (on remand from the Supreme Court). Even if one or two of the operative clauses were considered to be constitutional if enacted alone, the entire statute and oath still should be declared unconstitutional. So little would remain of the scheme enacted by the legislature that: "We have no way of knowing whether the Legislature would have enacted . . . [it] without the provision[s] which we conclude to be invalid. We are unable to decide

that these provisions are separable." *Pedlosky* v. *Massachusetts Institute of Technology*, 352 Mass. 127, 224 N.E.2d 414, 416 (1967). *Accord, Richardson* v. *Cole*, 300 F. Supp. 1321 (D. Mass. 1969); *Whitehill* v. *Elkins*, 287 F. Supp. 61 (D. Md. 1968).

CONCLUSION

Since 1961 this Court, and the nation's other courts, consistently have voided loyalty oaths and statutes such as the ones at issue in this case. This case, the direct descendant of the *Cramp* case, provides the Court with an opportunity to settle finally the constitutional controversy over negative test oaths and to evaluate an affirmative oath in such a negative context. Therefore, for the reasons set forth in the foregoing Jurisdictional Statement, the Court should take advantage of this opportunity and exercise plenary review over this case.

Respectfully submitted,

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January 1970

APPENDIX

Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-34-Orl-Civ

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Plaintiff,

—v.—

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction; LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction; and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LARUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Defendants,

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Intervenor.

Before SIMPSON, Circuit Judge, and YOUNG and SCOTT, District Judges.

SCOTT, District Judge:

The plaintiff in this case, a teacher in the Orange County, Florida, school system, seeks on behalf of herself and others similarly situated to have Section 876.05 of the Florida Statutes declared unconstitutional. In addition, plaintiff requests that a permanent injunction be granted restraining the defendants, their agents, officers and employees from executing or enforcing the provisions of this alleged unconstitutional section. Plaintiff alleges violation of her rights, privileges and immunities as a citizen of the United States, as secured by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Jurisdiction exists under 28 U.S.C. § 1343(3), 28 U.S.C. § 2201 and 42 U.S.C. § 1983.

Plaintiff alleges that (1) the loyalty oath contained in Section 876.05 of the Florida Statutes, which all state employees are required to execute as a condition of employment, is so vague and ambiguous that it cannot be interpreted with any reasonable degree of certainty and, since a purported violation of this section can subject one to criminal prosecution under Section 876.10 of the Florida Statutes, plaintiff is denied due process of law as guaranteed by the Fifth and Fourteenth Amendments, and (2) the oath abridges plaintiff's rights to freedom of speech, assembly and association as guaranteed under the First and Fourteenth Amendments.

This case was heard by a three-judge panel pursuant to 28 U.S.C. §§ 2281, 2284.

FACTS

On or about January 16, 1969, plaintiff made application for a teaching position with the defendant Orange County school system. After interviewing the plaintiff, the princi-

pal of Callahan Elementary School, Orlando, Orange County, Florida, recommended that the plaintiff be considered for employment as a substitute teacher for the fourth grade at that school. Plaintiff was told that she could begin her teaching duties on January 27, 1969, pending routine recommendation by the superintendent and approval by the Board of Public Instruction of Orange County.

At no time prior to her employment was the plaintiff informed by the defendants of the necessity that she sign a loyalty oath; it appears, however, that the plaintiff had some knowledge of Section 876.05 of the Florida Statutes at the time she commenced employment. On February 7, 1969, plaintiff was asked to execute the oath prescribed by the statute. Plaintiff declined, informing the defendants that the particular oath had been declared unconstitutional in *Cramp* v. *Board of Public Instruction of Orange County*, 368 U. S. 278 (1961). Defendants later asked plaintiff to sign a version of the oath as judicially amended by *Cramp* v. *Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962). Plaintiff also refused to sign this oath. At this point processing of plaintiff's employment papers was halted, prior to their consideration by the Board of Public Instruction of Orange County.

Defendants then informed the plaintiff that they were barred by Section 876.08 of the Florida Statutes from paying the plaintiff for any past or future services rendered by plaintiff until the oath was executed. Plaintiff related to defendants that she anticipated filing suit in the United States District Court and defendants informed plaintiff that she could remain in her teaching post without pay, pending decision on the matter.

On February 26, 1969, the plaintiff filed her complaint against the defendants seeking a hearing and determination

of the federal constitutional issues before a three-judge court, a permanent injunction and an interlocutory injunction pending final determination restraining the defendants from discharging the plaintiff as a teacher in the Orange County school system or refusing to pay her salary as a teacher. After the Court denied plaintiff's motion for a temporary restraining order plaintiff was dismissed on March 18th by defendants from her substitute teaching position. Plaintiff worked a total of seven weeks and has received no compensation from defendants for her services.

Subsequent to the denial of the plaintiff's request for a temporary restraining order, Floyd Christian, as Commissioner of Education for the State of Florida, requested and was granted leave to intervene in this action as a party defendant.

STANDING

Defendants contest the standing of the plaintiff to bring this action. They base this claim on the fact that plaintiff's application for employment was never considered by the Board of Public Instruction. Defendants contend that the plaintiff was merely a prospective employee being allowed to teach on a temporary basis pending final approval by the Board of Public Instruction. Defendants claim that plaintiff's application might have been rejected by the Board for a number of reasons based on plaintiff's qualifications as a teacher. The defendants conclude that, since plaintiff was never finally employed by the Board, she cannot now properly petition this Court for an injunction to prevent her dismissal and other appropriate relief.

Defendants' argument must fail. It is apparent from the outset that defendants' administrative agents contemplated no reason why plaintiff would not be approved by the

Board of Public Instruction. Defendants admit that final approval by the Board is in reality a routine matter after a recommendation by the superintendent and that permanent teachers are normally allowed to begin their teaching activities prior to approval by the Board. Neither have defendants come forward with convincing evidence of other valid grounds upon which plaintiff's dismissal might have been predicated.

The Orange County school system is an arm of state government and its agents, officers and employees are applying state law. Plaintiff is alleging that action by these state employees applying a state statute violates her constitutional rights. Plaintiff also claims that the application of this alleged unconstitutional statute will result in injury to her, i.e., denial of state employment and withholding of her salary for services rendered to the school system.

We shall not engage in a semantical argument concerning whether state employment is a "right" or a "privilege", but suffice it to say that the essence of due process is contained in the principle that, once the state has made available the benefit of state employment, it cannot predicate that employment on grounds which the state has no right to dictate. "The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution". *Torcaso* v. *Watkins,* 367 U. S. 488, at 495-96 (1960). "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion is patently arbitrary and discriminatory". *Wieman* v. *Updegraff,* 344 U. S. 183, at 192 (1952). If the statute in question is unconstitutional,

then plaintiff is injured by the defendants' refusal to employ her based on her failure to execute the oath, and this injury exists quite apart from the question of whether she was a "permanent" or a "temporary" teacher. Plaintiff, therefore, has the requisite standing to bring this action. See *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Gilmore* v. *James*, 274 F. Supp. 75 (N.D. Texas 1967), affirmed 389 U. S. 572, rehearing denied 390 U. S. 975; *Heckler* v. *Shepard*, 243 F. Supp. 84 (E.D. Idaho 1965).

CLASS ACTION

Plaintiff requests that she be allowed to maintain this action on behalf of all state employees who are required to execute a loyalty oath as a condition of their employment with the state. Defendants argue that plaintiff is not a proper representative of a class of state employees since her application had not been ruled upon by the Board of Public Instruction and, therefore, plaintiff was not a full-fledged state employee.

In order for a class action to be maintained under Rule 23 of the Federal Rules of Civil Procedure, there must be an ascertainable class and a proper representative. *Hamer* v. *Campbell*, 358 F. 2d 215 (5th Cir. 1966). Plaintiff in this case has gone through the application process for securing employment with a state-operated school system. As a condition to her employment with the school system, she was required to execute an oath in accordance with Section 876.05 of the Florida Statutes. If the section is enforced, any person seeking employment with a state agency would be required to execute such an oath as a condition of employment. Therefore, plaintiff's situation is one which is common to an ascertainable class of persons. That class

is all persons seeking employment with any state agency. See *Gilmore* v. *James, supra.* In addition, we find that plaintiff's cause of action meets the other requirements for a class action under Rule 23(a) and (b), Federal Rules of Civil Procedure.

THE OATH

Having disposed of the procedural aspects, we move to consideration of the oath prescribed by Section 876.05 of the Florida Statutes. The section reads in full:

"876.05 State employees; oath

"All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

"I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the

Government of the United States or of the State of Flofida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

"And said oath shall be filed with the records of the governing official or employment governmental agency prior to the approval of any voucher for the payment of salary, expenses, or other compensation".

It is well settled that a statute will be construed as severable where it is possible to interpret its provisions as distinct and to assume that the Legislature would have enacted the provisions separately. *United States* v. *Jackson*, 390 U. S. 570, 585 (1967). Indeed, this very statute has been said to be severable. *Cramp* v. *Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962).

The required oath contains a series of clauses to which the employee must swear. While all the matters contained in the oath are somewhat related, we feel that each clause has an independent basis for being contained in the oath. As such, the invalidity of certain portions of the oath does not prevent a meaningful application of the valid sections of the oath.

With this view of the statute, it is necessary to consider the separate validity of the clauses of the oath. First, we point out that this statute was the subject of prior litigation in the case of *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961) and *Cramp* v. *Board of Public Instruction*, 137 So. 2d 528 (Fla. 1962). In the *Cramp* case before the Supreme Court of the United States, that Court

ruled that the clause "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" was so uncertain and vague that the state, consistent with the due process clause of the Fourteenth Amendment, could not force the employee to take the oath at the risk of subsequent prosecution for perjury or face dismissal. We are, of course, bound by this pronouncement.

We next consider the portions of the statute reading "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence". Defendants concede that these portions of the oath may not be defensible, and they are correct. The cases are legion striking down similar language. *Whitehill* v. *Elkins*, 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1966); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952); *Gilmore* v. *James*, 274 F. Supp. 75, affirmed 389 U. S. 572 (1968), rehearing denied 390 U. S. 975.

The defect in the statute is that it conditions employment on non-membership or, in other words, it equates disloyalty with mere membership. In *Wieman* v. *Updegraff*, 344 U. S. 183 (1952), the issue was a statute which required as a condition of state employment the taking of a loyalty oath that the person was not, and had not been in the preceding five years, a member of any organization listed by the Attorney General as a "communist front" or "subversive". The Supreme Court of Oklahoma had interpreted the statute as excluding persons solely on membership regardless of knowledge of the activities or purposes of the organization. In holding that the statute violated

the due process clause of the Fourteenth Amendment, the Supreme Court said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy'. Yet under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process." 344 U. S. at 191.

The Supreme Court of Florida, in the case of *State* v. *Diez*, 97 So. 2d 105 (Fla. 1957), read the element of scienter into each of the required portions of the statute; we do not think, however, that this judicial gloss is sufficient to save these portions of the statute from constitutional defectiveness. Recent cases of the Supreme Court of the United States have pointed out that knowing membership cannot be restricted without a showing of a specific intent to further the unlawful aims of the organization.

Elfbrandt v. *Russell*, 384 U. S. 11, 16 L. ed. 2d 321, 86 S. Ct. 1238 (1966), involved an Arizona statute requiring state employees to take a loyalty oath containing provisions subjecting them to criminal penalties and discharge

from employment if they subsequently became or remained a member of the Communist Party or any other organization having for one of its purposes "the violent overthrow of the government of Arizona or any of its political subdivisions, if the employee has knowledge of such unlawful purpose of the organization". The Court stated "Any lingering doubt that proscription of mere knowing membership, without any showing of 'specific intent' would run afoul of the Constitution was set to rest in *Aptheker v. Secretary of State*, 378 U. S. 500, 12 L. ed. 2d 992, 84 S. Ct. 1659". 384 U. S. at 16.

The Court further stated "A law which applies to membership without the specific intent to further the illegal aims of the organization infringes unnecessarily on the protected freedoms. It rests on the doctrine of guilt by association, which has no place here". 384 U. S. at 19.

In *Keyishian v. Board of Regents of New York*, 385 U. S. 589 (1966), the Court further reinforced this point, stating, "Thus mere party membership, even with the knowledge of the party's unlawful goals, cannot suffice to justify criminal punishment. [Citing *Scales v. United States*, 367 U. S. 203 (1961); *Noto v. United States*, 367 U. S. 290 (1961); *Yates v. United States*, 354 U. S. 298 (1956)]; nor may it warrant a finding of moral unfitness justifying disbarment. *Schware v. Board of Bar Examiners*, 353 U. S. 232 (1957)". 385 U. S. at 607.

The Supreme Court of the United States has reaffirmed this view in the recent case of *United States v. Robel*, 389 U. S. 258 (1967). In that case, involving the constitutionality of a section of the Subversive Activities Control Act of 1950, the Court stated:

"The government emphasizes that the purpose of §5(a)(1)(D) is to reduce the threat of sabotage and

espionage in the Nation's defense plants. The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cuts deeply into the right of association. Section 5(a)(1)(D) puts appellee to the choice of surrendering his organizational affiliation, regardless of whether his membership threatens the security of a defense facility, or giving up his job. When appellee refused to make the choice, he became subject to a possible criminal penalty and a $10,000 fine. The statute quite literally establishes guilt by association without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. The inhibiting effect of the exercise of First Amendment rights is clear. It has become axiomatic that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms". 389 U. S. at 264-5.

We, therefore, hold that inclusion in the oath of the clauses "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence" unduly infringes upon the right of free association granted by the First and Fourteenth Amendments, and those clauses must be stricken from the oath.

We now give consideration to the portion of the statute which reads "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence". It should be noted that no cases

have been cited, and the Court is not aware of any cases, in which the Supreme Court of the United States has interpreted precisely this language in a loyalty oath.

The question is what steps may the state reasonably take in order to protect itself and the institution of ordered government from infiltration by those who adhere to the principles of violent overthrow and force. We held supra that clauses equating membership with disloyalty were overbroad in application and infringed upon First and Fourteenth Amendment freedoms. However, we hold that a clause which attempts to ferret out those with personal belief in the overthrow of the government is constitutional. This clause merely attempts to keep out of state employment those who are *personally* opposed to the democratic process. Surely this is a reasonable means to a legitimate end sought by the government.

What a person believes has a central effect on the views and actions taken by that person. It would be difficult to imagine that a person believing in the overthrow of the government by force or violence, just as a person holding any belief, would not attempt to influence others around him to adopt that belief. This principle has exceptional significance when applied to school teachers. Teachers, particularly those of the lower grades, are dealing with young and very impressionable minds. Who can doubt that the teacher is one of the most important persons in the life of any youngster or that the views expressed by the teacher have great impact on the developing attitudes of the child. Moreover, the teacher, in loco parentis, is in the position of having a captive audience upon which to express his views. This is not to say that all teachers make a patent attempt to influence their students to adopt the teacher's views. The attempt, if at all, may be overt or subtle.

Nevertheless, the potential for the exertion of the principles of violent overthrow as a way of life on the younger, inferior mind does exist. This potential presents grave dangers to the state's legitimate interest in educating youth and in the teaching of the principles of ordered government and the orderly process for change. The state may take reasonable steps to prevent frustration of that end. Cf. *American Communications Association v. Douds*, 339 U. S. 382 (1950).

For the same reasons we hold that the section of the oath requiring support of the Constitutions of the United States and of Florida is constitutional. Such an oath does not restrict legitimate exercise of the freedom of speech and of association. The clause in no way impermissibly restricts what the individual may believe, what he may say or to what organization he may belong. Because the clause does not "chill" these First and Fourteenth Amendment freedoms, we hold it to be a legitimate exercise of the state's interest in securing loyal employees. See *Bond* v. *Floyd*, 385 U. S. 116, 135-36 (1966); *Knight v. Board of Regents of University of State of New York*, 269 F. Supp. 339 (S.D. N.Y. 1967), affirmed, memorandum, 390 U. S. 36.

It is, therefore,

ORDERED AND ADJUDGED:

I. The following language of Section 876.05 of the Florida Statutes is constitutional, and the state may condition employment on the execution of an oath containing the following language:

> "I, ..., a citizen of the State of Florida and of the United States of America and being employed by or an officer of ..... and a

recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence".

II. We find that all provisions of the oath prescribed by Section 876.05 of the Florida Statutes other than those stated in (I.) above are unconstitutional and the state may not condition employment on the execution of these disapproved provisions.

III. In light of our previous holding, all but the following language from Section 876.07 of the Florida Statutes is held to be without force or effect:

"Any person having taken the oath provided for in § 876.05 and who thereafter . . . expresses any belief in . . . the overthrow of the government of the United States or of the state by violence or force . . . shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file an oath required by this act shall be held to have failed to qualify as a candidate for public office, and the name of such person shall not be printed on the ballot as a qualified candidate".

IV. A permanent injunction will issue from this Court restraining the defendants, their agents, officers and em-

ployees from further enforcement of Sections 876.05 and 876.07 of the Florida Statutes in a form other than that approved above.

V. Since the school term for which plaintiff's contract was to run has now ended, we deem it unnecessary for this Court to consider plaintiff's request for an interlocutory injunction restraining the defendants from dismissing her from her teaching post.

VI. We hold that plaintiff was under no obligation to execute an oath containing unconstitutional language. During the time plaintiff was actually teaching no wholly constitutional oath was offered to the plaintiff by defendants for execution. Accordingly, we feel that in equity and good conscience the plaintiff is entitled to her salary as a substitute teacher for the seven weeks of actual time she spent teaching. However, we affirm the denial of the temporary restraining order by a judge of this panel to prevent the March 18, 1969, dismissal of plaintiff by the defendants. As that judge pointed out in his ruling at the conclusion of the hearing on the application for a temporary restraining order, there was no showing that the plaintiff would suffer irreparable harm by the denial of the temporary restraining order as any loss of wages could be compensated for by any damages awarded in this action.

Since plaintiff's dismissal on March 18, 1969, resulted from her refusal to execute an invalid oath, such dismissal was impermissible on such a basis alone and the plaintiff is entitled to the salary she would have received from March 18, 1969, to the end of the school term in June 1969.

Judgment shall be entered in accordance with this opinion and costs shall be assessed accordingly.

Concurring Opinion

YOUNG, *District Judge.*

I concur with Judge Scott's excellent opinion with the following explanatory remarks. I agree without reservation to Judge Scott's conclusion that the portion of the prescribed oath which reads, "that I do not believe in the overthrow of the Government of the United States or the State of Florida by force or violence" is constitutional. However, I reluctantly concur in the holding that plaintiff is entitled to her salary to June 1969 and that the portions of the prescribed oath reading, "that I am not a member of the Communist Party" and "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or Florida by force or violence" are unconstitutional only because controlling decisions require such determinations by this Court.

SIMPSON, *Circuit Judge,* concurring in part and dissenting in part:

In major part, I concur. I think that the court has properly disposed of the question of standing and that it correctly decides that this case meets the requirements for a class action prescribed by F.R.Civ.P. Rule 23(a) and (b).

I concur also in the majority's holding that the oath prescribed by the Florida statute (F.S.A., Section 876.05) in the amended form submitted by defendants to plaintiff is unconstitutional in each of the particulars pointed out by

the court.[1] But for similar reasons I would hold that the provision: "that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence", is also unconstitutional.

This provision deals solely with *belief*, with what is in the mind and may remain there forever unexpressed by word or deed. It does not deal with action. It does not even deal with spoken or written words advocating overthrow of government. Surely a teacher is entitled to his or her private, secret thoughts and beliefs. I view this attempt to regulate belief unattended by word or action as more clearly a violation of constitutional rights than provisions requiring an oath that the applicant does not belong to the Communist party, or that he does not belong to an organization listed as subversive by the Attorney General.[2] In those cases belief has at least been acted upon to the extent of joining an organization.

As to the provision requiring a pledge of support of the federal and state constitutions, I am not so certain. This is an innocuous provision. Violation of it would be difficult to charge and probably impossible to prove. For reasons of vagueness alone I am inclined to believe it should be stricken also.

Of course I agree that the plaintiff should be paid for her services to the end of the school term in June 1969, the contract period.

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[1] The corresponding provisions of Sec. 876.07 of course fall with the portions of Sec. 876.05 held unconstitutional.

[2] Cf. cases cited and quoted from by the majority opinion on pages 9, 10, 11. See further: *Brandenburg* v. *State of Ohio*, 1969, 395 U.S. 444, 89 S.Ct. ——, 23 L.Ed.2d 430.

Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

No. 69-34-Orl-Civ

STELLA CONNELL, individually, and on behalf of all persons similarly situated,

Plaintiff,

v.

JAMES M. HIGGINBOTHAM, Superintendent of the Orange County Board of Public Instruction, LOUISE BREEZE, Chairman of the Orange County Board of Public Instruction, and LOWELL CLEMENTS, RAYMOND H. BASSETT, WILLIAM D. LARUE, HARLEY THOMPKINS, MRS. LEE K. DAVIES and STEWART M. SCHAFFER,

Defendants,

FLOYD T. CHRISTIAN, Commissioner of Education, State of Florida,

Intervenor.

ORDERED AND ADJUDGED:

1. Final judgment shall be and is hereby entered in favor of the plaintiff, Stella Connell, individually, and on behalf of all persons similarly situated, and against the defendants, James M. Higginbotham, Superintendent of

the Orange County Board of Public Instruction, Louise Breeze, Chairman of the Orange County Board of Public Instruction, and Lowell Clements, Raymond H. Bassett, William D. LaRue, Harley Thompkins, Mrs. Lee K. Davies and Stewart M. Schaffer, in accordance with the majority opinion of the Court and the opinion of Circuit Judge Simpson, concurring in part and dissenting in part.

2. The defendants, their agents, officers or employees are permanently enjoined from conditioning employment on the taking of an oath which prescribes "that I am not a member of the Communist Party" or "that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party" or "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the United States by force or violence", which provisions are now contained in Section 876.05 of the Florida Statutes. The defendants, their agents, officers and employees are likewise permanently enjoined from enforcing Section 876.07 of the Florida Statutes in such a manner as to require the execution of the above disapproved phrases as a condition to remaining in the defendants' employ or as a condition to receiving payment from the defendants for services rendered.

3. The Court retains jurisdiction over this suit for the purpose of insuring compliance with the injunction and the order directed to defendants to pay the plaintiff the salary that has been adjudged to be due and owing.

4. The costs shall be hereafter taxed in favor of the plaintiff and against the defendants.

DONE AND ORDERED this 30th day of October, 1969.

BRYAN SIMPSON
United States Circuit Judge

GEORGE C. YOUNG
United States District Judge

CHARLES R. SCOTT
United States District Judge

Statutes

876.05 *State employees; oath.*—

(1) All persons who now or hereafter are employed by or who now or hereafter are on the payroll of the state, or any of its departments and agencies, subdivisions, counties, cities, school boards and districts of the free public school system of the state or counties, or institutions of higher learning and all candidates for public office, are hereby required to take an oath before any person duly authorized to take acknowledgments of instruments for public record in the state in the following form:

I, ..., a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence.

(2) Said oath shall be filed with the records of the governing official or employing governmental agency prior

to the approval of any voucher for the payment of salary, expenses, or other compensation.

History.—Comp. §1, ch. 25046, 1949.

Note.—See 7 L.Ed. 2d 285 and 137 So. 2d 828 as to constitutionality of section.
cf.—§90.01, Oaths, requirements.

876.06 *Discharged for refusal to execute.*—If any person required by §§876.05-876.10 to take the oath herein provided for fails to execute the same, the governing authority under which such person is employed shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving.

History.—Comp. §2, ch. 25046, 1949.

876.07 *Persons giving aid, advice, etc., to communist party.*—Any person having taken the oath provided for in §876.05 and who thereafter should become a member of the communist party or who lends aid, support, advice, counsel or influence to the communist party or who expresses any belief in or advocates the overthrow of the government of the United States or of the state by violence or force or thereafter becomes a member of an organization or party which believes in or teaches directly or indirectly the overthrow of the government of the United States or of the state by force or violence, shall immediately be discharged from his employment by the employing authority and his name shall be removed from the payroll, and thereafter such person shall not be permitted to receive any payment as an employee or an officer where he or she then was serving. Any person seeking to qualify for public office who fails or refuses to file the oath required by this act shall be held to have failed to qualify as a candidate for

public office, and the name of such person shall not be printed on the ballot as a qualified candidate.

History.—Comp. §3, ch. 25046, 1949.

876.08 *Penalty for not discharging.*—Any governing authority or person, under whom any employee is serving or by whom employed who shall knowingly or carelessly permit any such employee to continue in employment after failing to comply with the provisions of §§876.05-876.10, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both fine and imprisonment.

History.—Comp. §4, ch. 25046, 1949.

876.09 *Scope of law.*—

(1) The provisions of §§876.05-876.10 shall apply to all employees and elected officers of the state, including the Governor and constitutional officers and all employees and elected officers of all cities, towns, counties and political subdivisions, including the educational system.

(2) This act shall take precedence over all laws relating to merit, and of civil service law.

History.—Comp. §§5, 7, ch. 25046, 1949.

876.10 *False oath; penalty.*—If any person required by the provisions of §§876.05-876.10 to execute the oath herein required executes such oath, and it is subsequently proven that at the time of the execution of said oath said individual was guilty of making a false statement in said oath, he shall be guilty of perjury, and shall be prosecuted and punished for the crime of perjury in the event of conviction.

History.—Comp. §6, ch. 25046, 1949.

Loyalty Oaths

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party; that I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the government of the United States or of Florida by force or violence.

.....

STATE OF FLORIDA,
COUNTY OF .....

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO before me this .....
day of ..... A.D. 19.....

.....

LOYALTY OATH

As required by Chapter 25046 (No. 50) Acts of 1949

"I, ... a citizen of the State of Florida and of the United States of America, and being employed by or an officer of ..... and a recipient of public funds as such employee or officer do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida; that I am not a member of the Communist Party; that I do not believe in the overthrow of the Government of the United States or of the State of Florida by force or violence; that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States or of Florida by force or violence."

.....

STATE OF FLORIDA,
COUNTY OF ....., *ss.*:

Personally appeared before me ..... who states ..... has read the foregoing oath and is familiar with what it says and that ..... signed it freely and voluntarily, and in my presence.

SWORN TO and subscribed to and before me this ..... day of ....., A.D. 196.....

.....
Notary Public

MY COMMISSION EXPIRES:

.....

(NOTARY SEAL)

Stipulation in *Adams* v. *Board of Regents of the State of Florida*

IN THE

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

Civil Action No. 69-240

DR. PAUL ADAMS, *et al.*,

Plaintiffs,

—v.—

THE BOARD OF REGENTS OF THE STATE OF FLORIDA, *et al.*,

Defendants.

STIPULATION

IT IS HEREBY stipulated and agreed by and between counsel for the respective parties as follows:

1. That ANNE C. BARDSLEY and EVAN SUITS come within the class affected by the outcome of this litigation, and shall be joined as parties Plaintiff in this cause.

2. That LEROY L. LAMBORN, ANNE C. BARDSLEY and EVAN SUITS have refused to sign the loyalty oath prescribed by Section 876.05 of the Florida Statutes, as modified by the decision of this Court in *Connell* v. *Board of Public Instruction*, a copy of the oath furnished to these Plaintiffs being annexed hereto and incorporated herein by reference as Exhibit "1".

3. That as a direct result of the refusal of these Plaintiffs to execute under oath the loyalty oath attached hereto as Exhibit "1", LAMBORN, BARDSLEY and SUITS were discharged from their employment by the University of Florida on November 26, 1969.

4. That LEROY L. LAMBORN had been employed by the University of Florida as Assistant Professor of Law for the Academic year 1969-1970 at a salary of $12,000.00, a copy of his appointment of employment being attached hereto and incorporated herein by reference as Exhibit "2".

5. That EVAN SUITS had been employed by the University of Florida as Interim Instructor in the Department of Psychology at a monthly salary of $375.00 for the academic year, 1969-1970.

6. That ANNE C. BARDSLEY had been employed by the University of Florida as a Clerk II in the Library system, at a monthly salary of $314.00 for the period of July 1, 1969 to June 30, 1970.

7. That the academic year, 1969-1970, at the University of Florida commenced September 16, 1969, and concludes June 15, 1970.

DATED this 17th day of December, 1969.

/s/ RIVERS BUFORD, JR.

Rivers Buford, Jr.
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